STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO VERDE TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2248
v.	)	PERB Decision No. 642
PALO VERDE UNIFIED SCHOOL DISTRICT,	)	December 15, 1987
Respondent.	)	

Appearances; Charles R. Gustafson, Attorney, for Palo Verde Teachers Association, CTA/NEA; Atkinson, Anderson, Loya, Ruud & Romo by Ronald C. Ruud for Palo Verde Unified School District.

Before Hesse, Chairperson; Porter, Shank and Cordoba, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Palo Verde Unified School District (hereafter District) to the proposed decision (attached hereto) of the PERB administrative law judge (hereafter ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA or Act) section 3543.5(c)[1] and, derivatively, (a) and

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:

(b), both by unilaterally implementing, during negotiations for the 1985-86 school year, a six-percent salary increase and by adopting a resolution which, in the event of a strike called by the Palo Verde Teachers Association, CTA/NEA (hereafter CTA/NEA), would affect working conditions.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free from prejudicial error and adopts them as its own. With the exceptions noted below, we are also in agreement with and hereby adopt the conclusions of law set forth in the ALJ's decision.

DISCUSSION

The ALJ's proposed decision correctly concludes that the six-percent salary increase unilaterally implemented by the District while the parties were still negotiating for a collective bargaining agreement for the 1985-86 school year violated EERA. We disagree, however, with the finding and conclusion of the ALJ that the resolution adopted by the

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

District, at the same time as the six-percent increase, also violates EERA for the following reasons:

1. The adoption of the resolution was not charged.

A review of the charges filed by the CTA/NEA and incorporated by reference in the complaint issued by the Board's general counsel do not include any mention of the resolution. Only the six-percent unilateral salary increase is included.

2. The resolution was not introduced in evidence.

The only reference to the resolution at the hearing before the ALJ occurred during direct examination of Richard Roy, member of the District board, as follows:

> Q (By Mr. Ruud) Do you recall the Board taking action with respect to an emergency resolution dealing with substitute teachers in the event of a strike?
>
> A Yes, I do.
>
> Q Did the Board pass such a resolution?
>
> A Yes, they did.
>
> Q When?
>
> A I believe it was September 6th. It was a day or two after that September 4th negotiation session.

The District excepted to a statement contained in the ALJ's proposed decision which reads as follows:

> At the September 6 meeting the Board also adopted an emergency resolution as a

> response to what it perceived as a threatened strike. The Association alleged, and the District did not dispute, that this resolution, in the event of a strike, would have unilaterally changed terms and conditions of employment as the term is defined in the Act. The exact wording of such resolution was not placed into evidence at the formal hearing in this case. (See Proposed Decision at p. 13.)

As grounds for this exception the District states:

> The District did not admit or otherwise stipulate that the emergency resolution, in the event of a strike, would unilaterally have changed terms and conditions of employment.

Since the resolution was not introduced in evidence and since the record supports the District's contention that it neither stipulated nor admitted to the content or effect of the resolution, there is a complete failure of proof with respect to its contents or its impact in the event of a strike. We further note that neither party mentioned or discussed the resolution in their post-hearing briefs. Without the resolution itself or more evidence in the record that this matter was fully litigated, the Board is simply constrained from determining whether it was improper unilateral action by the District or, conversely, an appropriate emergency response. (Santa Clara Unified School District (1979) PERB Dec. No. 104). We, therefore, reject all references to the resolution in the proposed decision and adopt a new order consistent with this Decision.

We would reiterate, however, that we expressly affirm that portion of the ALJ's proposed decision that finds the six-percent salary increase unilaterally implemented by the District during negotiations to be a violation of EERA. The Board has consistently held that "self-help" during negotiations that concern matters within scope are a violation of EERA and may be remedied by the filing of an unfair practice charge with the Board by a party who believes negotiations are not being conducted in good faith or, in the event of an actual strike, the remedy may be a request to the Board for injunctive relief (Compton Unified School District (1987) PERB Order No. IR-50).

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Palo Verde Unified School District violated section 3534.5(c) and, derivatively, (a) and (b) of the Educational Employment Relations Act. Pursuant to Government Code section 3541(c), it is hereby ORDERED that the Palo Verde Unified School District, its governing board and its representative(s) shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate prior to the modification of subjects within the scope of representation, such as salary and other working conditions.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the Act.

3. Denying to the Palo Verde Teaches Association, CTA/NEA, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSE OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Negotiate, upon request of the Association, any modification of subjects within the scope of representation, including the issue of any salary increase and/or modifications of working conditions.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to certificated employees are customarily placed copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of this decision, written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

Chairperson Hesse and Members Porter and Cordoba joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-2248, Palo Verde Teachers Association, CTA/NEA v. Palo Verde Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(c) and, derivatively, sections 3543.5(a) and (b) when it unilaterally implemented modifications in salary without first negotiating such modifications with the exclusive representative of its employees.

As a result of this conduct, the District has been ordered to post this Notice and it will:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate prior to the modification of subjects within the scope of representation, such as salary and other working conditions.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the Act.

3. Denying to the Palo Verde Teaches Association, CTA/NEA, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE PURPOSE OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Negotiate, upon request of the Association, any modification of subjects within the scope of representation, including the issue of any salary increase and/or modifications of working conditions.

DATED:

PALO VERDE UNIFIED SCHOOL DISTRICT

By_____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO VERDE TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. PALO VERDE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2248 PROPOSED DECISION (6/3/87)

Appearances: Charles R. Gustafson, Esq., California Teachers Association, for the Palo Verde Teachers Association, CTA/NEA; Atkinson, Anderson, Loya, Ruud & Romo by Ronald C. Ruud, Esq., for the Palo Verde Unified School District.

Before: Allen R. Link, Administrative Law Judge

PROCEDURAL HISTORY

On September 25, 1985, the Palo Verde Teachers Association, CTA/NEA (hereafter Association or Charging Party) filed this Unfair Practice Charge with the Public Employment Relations Board (hereafter PERB or Board) against the Palo Verde Unified School District (hereafter District or Respondent), alleging violations of the Educational Employment Relations Act (hereafter EERA or Act)[1]

The General Counsel of the PERB, after an investigation of the Charge, issued a Complaint on October 4, 1985. The Complaint alleged violations of Government Code sections

[1]The Educational Employment Relations Act is codified at section 3540 et seq. of the Government Code. All section references, unless otherwise indicated, are to the Government Code.

3543.5(a), (b), (c) and (e).[2] On October 23, 1985, the District filed its Answer setting forth a number of affirmative defenses.

An informal conference was held on November 14, 1985, to explore voluntary settlement possibilities. As no settlement was reached, the formal hearing in this matter was held before the undersigned on February 3 and 4, 1986. Both parties were given an opportunity to brief their respective positions. The Association's closing brief was submitted on June 2, 1986.

INTRODUCTION

The parties were unable to agree to a 1984-85 collective bargaining agreement (hereafter CBA) and, after completing the impasse procedure and a post-factfinding bargaining session,

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[2]Sections 3543.5(a), (b), (c) and (e) state:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

the District unilaterally, in May 1985, implemented modifications in both salary and working conditions.

The Association filed an Unfair Practice Charge which was dismissed by PERB's General Counsel. On May 24, 1985, the Association held a one-day strike. During the ensuing summer months the Association held many meetings and engaged in the outward manifestations of readying itself for a strike at the beginning of the 1985-86 school year.

On August 15 and September 4, 1985, scheduled negotiating sessions were held. No resolution of the issues was reached. On September 6, 1985, the District's governing board, in order to defuse strike momentum, unilaterally implemented a six-percent salary increase. At this same meeting the governing board adopted an emergency resolution in response to the threatened strike. This resolution unilaterally modified specified working conditions for the certificated employees, but would be operative only in the event a work stoppage occurred.

The Association complains that the District, in both its salary implementation and its passage of the emergency resolution, violated the Act in that it unilaterally changed terms and conditions of employment.

JURISDICTION

The parties stipulated to the Respondent being a public school employer and the Charging Party being an exclusive representative within the meaning of section 3540.1 of the Act.

FINDINGS OF FACT

During the 1984-85 school year, the District and the Association failed to reach agreement at the negotiations table and proceeded through statutory impasse procedures, including the factfinding process. A factfinding report was issued on May 17, 1985. On May 23, 1985, the parties met to consider the factfinder's recommendations and no agreement was reached. On May 24, 1985, the Association called a one-day strike, after which all unit members returned to work for the balance of the school year.

On May 29, 1985, the District's Board of Education unilaterally implemented both salary increases and other changes in the teacher's work year. Such modifications were consistent with its last position at the negotiation table. In response, the Association filed an Unfair Practice Charge challenging the legality of these actions. The Charge was dismissed by PERB's General Counsel who determined, after an investigation, that the unilateral modifications were permissible.

In early June 1985, the Association began preparations for a strike to commence at the beginning of the 1985-86 school year. The newly-elected Association president, Robert Jeppson, met, later that month, with state CTA representatives Halle Reising and Barbara Kerr at the Rodeway Inn in Blythe to discuss a possible 1985-86 strike. Robert Procko, a CTA field representative, and Gerald Colcun, a local Association

representative, also attended the meeting during which "financial aspects" of a possible strike were discussed.

A June 5, 1985, newspaper article in the Palo Verde Times quoted Jeppson, as follows:

> Besides voting the previous evening to go on strike teachers also voted not to return to the classroom the next year if they did not receive a contract that they consider acceptable. Teachers reaffirmed that commitment during the meeting Thursday according to Bob Jeppson, association president.
>
> Jeppson also added that PVTA plans to step up activities during the summer if no progress takes place in negotiations. Activities can include preparing news releases, picketing and circulating literature in neighborhoods to drum up community support.

Jeppson acknowledged the accuracy of most of this article, but denied that a written ballot strike vote had been taken with regard to their return to the classrooms at the beginning of the 1985-86 school year.

The Association bought an advertisement in the June 7, 1985, edition of the Palo Verde Times, which included the following statement:

> A strike vote for the fall of 1985 has not been taken yet by the Palo Verde teachers. However, teachers have voted to take all actions necessary to prepare for the likelihood that classrooms will not open in the fall unless teachers have a satisfactory contract. Teachers will work hard to negotiate a contract; they will compromise where necessary; but they do not want the 1985-86 school year to begin until the Palo Verde Unified School District has changed its priorities and begins to offer its

> teachers the same salaries and the same respect teachers receive in other school districts.

The "contract" referred to was the prospective 1985-86 collective bargaining agreement.

Toward the end of June, Superintendent Leamon E. Hanson asked the Association to join with him in starting negotiations on the 1985-86 school year calendar. In response, the Association submitted a "Statement" of its position which included the following:

> . . . all of the 1984-85/1985-86 issues which were carried into Factfinding but which are not yet settled. A number of non-calendar issues need to be settled before it would be meaningful to discuss such calendar issues as which day teachers will return for work for 1985-86.

No bargaining sessions occurred during the months of June and July 1985. On July 19, 1985, Association negotiator Scott Wiseman sent a memorandum to unit members giving notice of an August 19, 1985, meeting. Wiseman's memorandum stated in part:

> . . . we are doing all possible to meet with the District to negotiate a satisfactory contract before the start of the school year, and at the same time we are putting the machinery in place for a strike so we'll be ready if that's what it comes to.
>
> The negotiations team is asking the PVTA president to hold a meeting of teachers on Monday, August 19, at 9 a.m., in the high school library. At that meeting, we expect a vote to be taken either (1) to ratify a 1985-86 contract—if we have negotiated one by then, or (2) to begin a strike as of August 20, or (3) to give up and accept whatever the District wants to offer.

An August 2, 1985, article in the Palo Verde Times quoted Jeppson as confirming the three alternatives set forth in Wiseman's memo.

Toward the end of July 1985, the Superintendent contacted Wiseman to discuss "sunshining" initial 1985-86 CBA proposals and to begin negotiating the CBA for the upcoming school year. To expedite matters, because of the strike threat, Dr. Hanson asked Wiseman if the Association's "Statement" of June 26, see supra, could be treated as its initial proposal. Wiseman eventually agreed, and that June 26 statement, along with the District's initial proposal, were "sunshined" on August 6. The District's initial proposal contained a proposed increase in the salary schedule of six percent or, in the alternative, a downward modification in the health plan and an eight-percent salary schedule increase. Ordinarily, the Association submits its proposal first and the District responds with its counter-proposal after a public hearing on the Association's proposal.

The first negotiating session was held on August 15, 1985. Attorney Ron Ruud and Cliff Hillis represented the District and Wiseman, Jeppson and Jeannie Webber served as the Association's negotiating representatives. Most of the session was spent discussing the issue of discipline. The District offered a counterproposal on discipline, and Jeppson did not recall if the Association offered any proposals beyond its June 26 "Statement."

The Association's membership meeting occurred, as scheduled, on August 19, 1985. The 1985-86 school year was scheduled to begin the next day. Approximately 60 of the 142 unit members attended the meeting. A vote was taken and it was recommended that a work stoppage not take place at that time. Instead, a resolution was passed instructing the negotiating team to continue negotiating until August 26, when another vote would be taken.

At the August 19 meeting concern was expressed that there was not sufficient support for a strike. At the time, the Association was aware that the next negotiating session was not scheduled until September 4, but the leadership contemplated either scheduling another negotiations session and/or going directly to various members of the school board prior to August 26. After the August 19 Association meeting, Jeppson went to the Superintendent with a counterproposal from the Association. The counterproposal included unresolved 1984-85 issues. The Superintendent, who was not on the District bargaining team, declined to negotiate away from the table.

The next day, August 20, Jeppson sent an "update" to unit members. In part, this update read as follows:

> A general teacher's meeting was held Monday at 9 a.m. in the High School library. Teachers were given an update on the progress (or lack of) of negotiations. Teachers gave input on and asked questions about many of the issues. After much discussion, a motion was made that teachers work during the week of orientation and that they meet Monday August 26th at 6:00 a.m. in

> the High School Library to decide what further action to take. The motion was passed unanimously. A Crisis Committee meeting was scheduled for later in the day.
>
> Early in the afternoon, I met with Dr. Hanson to present our compromise proposal and to try to set up another negotiations session. He told me that I should just hold on to our proposal until we could meet with Mr. Ruud. I asked him if we could meet with him without Mr. Ruud and Tom Brown present to try to settle a few of the issues. He stated that he was not on the District's Bargaining Team and did not want to meet with us. He said that he would call Mr. Ruud and then get back with me. I did leave a copy of our proposal on his desk.
>
> While I was talking to Dr. Hanson, Annanias Bowens (a Board Member) called and wanted to know what teachers were planning to do. I informed him through Dr. Hanson of our intentions. Dr. Hanson seemed surprised and somewhat irritated that we would wait until Monday morning to make a decision on whether to strike that day.

During the orientation period between August 19 and 22, 1985, the Association distributed to all certificated employees a two-page handout entitled "Teachers Strike?" The handout was prepared by President Jeppson and other leaders of the Association. A portion of that document reads as follows:

> Did you know that:
> . . . teachers' strike does not hurt students
> (1) if the schools are closed during the strike;
> (2) if students get their regular 180 days of education after the strike is over; and
> (3) if the schools are better because of the strike?
>
> * * * *
>
> . . . your teachers may strike Monday morning, August 26, because they still do not have a contract?

> . . . your teachers tried to negotiate this summer but could not get the district to negotiate except for 6 hours on August 15?
> . . . since June, the district has been preparing for a strike instead of negotiating to avoid one?

Jeppson testified that the Association's "ideal" objective was to close school without the strikers incurring any economic loss. This could be done by making up any days lost during the strike at the end of the scheduled school year.

On or about August 22, 1985, the Association distributed another handout to its members which, after reminding them to attend the August 26 a.m. meeting, stated, in pertinent part, as follows:

> . . .If you think a strike is necessary, you will need to be there to vote for it. If you want to give the District more time you need to be there to vote for that. Everybody and every vote counts.

Approximately 60 teachers attended the August 26 meeting. The strike issue was discussed during the meeting along with Jeppson's concern that there had not been an opportunity, at the August 15 negotiations session, to negotiate over issues for the 1985-86 school year.

Jeppson was concerned that the Association would be unable to engage in a successful strike at that time. Fewer than half its unit members showed up at the meeting. Even among the 60 teachers who attended, there were various viewpoints as to the appropriate course of action. In addition, there was a fear the District had access to a larger than usual number of

substitutes because nearby school districts were not yet in operation.

At the August 26 meeting, a consensus developed that there was insufficient momentum for a strike at that time and that another attempt to reach agreement should be made. However, in the event of failure to reach agreement, the possibility of a strike action would be reviewed again at the end of September.

The next negotiating session was held on September 4, during which the Association continued to demand salary increases on the order of 30 percent as well as concessions on the old 1984-85 issues. Based upon these demands, which the board perceived to be unrealistic, the board members became convinced of the Association's intent to instigate a work stoppage. Board Member Richard Roy testified on this subject, as follows:

> Q Now, you testified that you perceived that that proposal was in some respects unrealistic?
>
> A Yes.
>
> Q In what respects? I'm talking now about — asking about your own perception as a Board member.
>
> A Well, it was unrealistic primarily because it continued to discuss the previous year's settlement which had already been settled, and —
>
> Q You mean the 1984-85 issues?
>
> A Yes. Not just salary but SB-813 minutes and hours and those issues as well. And therefore unrealistic in its salary demands because when you put the two

together it was 31 something percent to put on the scale or schedule. It was unrealistic in many of the other demands but I perceived those as unrealisms which are a part of the negotiation process.

Q But did you come away from the September 4 bargaining session with — what were your perceptions about the Association's intent to reach an agreement based upon their proposal of August 19?

A I was convinced that there must be some other goal in mind for the PVTA other than to settle at any soon date in negotiations.

Q What was the other goal?

A That perhaps they were trying to get us to reject their offer and thus give them more ammunition for a strike.

Q Was it the perception of the Board that the PVTA leadership was more interested in fomenting a strike than reaching agreement at the table?

A Yes, I would say. It's a matter of measuring whether they were more than this or that, but it seemed to us that they certainly were preparing and planning and seeking to gain momentum and backing for a strike.

Mr. Roy also testified, with regard to the unilateral salary increase, as follows:

Q Why did the Board take that action?

A Well, the Board, as I understood it, perceived that by taking that action we would be best serving our District and the educational needs of our kids.

We were convinced at that point that further negotiations — well, the PVTA was not realistic in their negotiating procedures, were not, in a sense, at

> least in our perception, negotiating towards solving their — agreeing to a contract. We were under the threat of a strike. The Board very much felt that a strike was imminent. In fact, the Board was surprised that we weren't already under strike at that time.
>
> And we felt that if we could give the teachers money up front that A, that would help to lessen the chance of a strike, and B, it would give the teachers money up front where if we stayed to our policy of non-retroactivity which we had agreed to in these negotiations they wouldn't be the ones that would be penalized by long, drawn-out negotiations.

On September 6, 1985, the board unilaterally implemented the six percent salary increase. This action had been discussed with the Association during the September 4 negotiations session, when the Respondent announced its intent to continue negotiating over all issues with flexibility on every subject except retroactivity. The 1985-86 salary offer was eventually raised to ten percent (including the initial six percent) in later negotiating sessions.

At the September 6 meeting the Board also adopted an emergency resolution as a response to what it perceived as a threatened strike. The Association alleged, and the District did not dispute, that this resolution, in the event of a strike, would have unilaterally changed terms and conditions of employment as the term is defined in the Act. The exact wording of such resolution was not placed into evidence at the formal hearing in this case.

Since early summer, long before this emergency resolution was enacted by the school board, Superintendent Hanson had been preparing for the possibility of a strike. He met on a weekly basis with principals to develop a strike plan, and ran newspaper advertisements for substitute teachers throughout the summer. He also conferred with administrators in other districts, developed special instructional materials and added extra telephone lines. In order to arrange for adequate security, the Superintendent was in contact with the California Highway Patrol, the Riverside County Sheriff's Department and local police. These strike preparation efforts were time-consuming and costly.

During September and October 1985, the Association communicated directly with individual board members concerning negotiations issues.

Jeppson explained the Association's reasoning in going directly to the individual Board members as a basic right to "lobby" a public' body. Various written materials on negotiations issues were sent directly to both the Superintendent and the Board, although the Association was aware of the Respondent's authorized negotiating team.

ISSUES

Did the Respondent violate EERA sections 3543.5(a), (b), (c) or (e) when it unilaterally implemented a six-percent salary increase and enacted the subject emergency resolution?

CONCLUSIONS OF LAW

A unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate. NLRB v. Katz (1962) 369 U.S. 736, 50 LRRM 2177. PERB has long recognized this principle. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.

A unilateral change is found when an employer unilaterally alters an established policy. That policy may be embodied in a collective bargaining agreement. Grant Joint Union High School District (1982) PERB Decision No. 196. When a contract is silent or ambiguous as to a policy, the existence of a unilateral change may be ascertained by examining past practice or bargaining history. Marysville Joint Unified School District (1983) PERB Decision No. 314; Rio Hondo Community College District (1982) PERB Decision No. 279.

There is little doubt that the unilateral implementation of both a salary increase and other changes in terms and conditions of employment prior to the conclusion of impasse is a prima facie showing of a violation of section 3543.5(c). It is axiomatic that the subject of salaries is within the mandatory scope of representation.[3] It is also found that

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[3]Section 3543.2 states, in pertinent part, as follows:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. . . .

the subjects of the emergency resolution were within the mandatory scope of representation. The crucial issue lies with the Respondent's defense to its admittedly unilateral action.

One defense the Respondent propounded was that irrespective of its unilateral action on salaries the District continued to negotiate salaries, and did, in fact, eventually agree to a ten-percent salary increase (four additional percent above the initial six-percent). This defense was rejected by the Board, itself, in Antioch Unified School District (1985) PERB Decision No. 515, when it stated:

> The District's argument that, notwithstanding its unilateral salary reduction, it continued to negotiate those salaries to impasse, is at odds with the well-settled labor relations law of both this agency and the National Labor Relations Board. Decisions following NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] make clear that where an employer unilaterally changes a working condition which is at the time a subject of negotiations, the required element of good faith on the part of the employer is destroyed. See, e.g., Amador Valley Joint Union High School District (1978) PERB Decision No. 74. As a practical matter, it is clear that such unilateral action alters the balance of bargaining power held by the parties. Where, as here, an employer desires to change the status quo, it cannot, under the EERA, achieve that end until such later time as it has completed its negotiating obligation. That the negotiating obligation will delay implementation, then, acts as an incentive for the employer to expeditiously pursue negotiations and, perhaps, even to make concessions sought by the union in order to bring negotiations to a conclusion. Where, however, the employer first unilaterally implements the change it desires in the

> status quo, its motivation in negotiations is obviously changed. The incentive to reach agreement is undermined because it has already achieved what it desires. (Emphasis in original.)

Based on this Antioch precedent, it is determined that this defense is without merit.

The District, however, asserts, as its primary defense, a contention that the Charging Party's strike preparations and "saber rattlings" were gross misconduct which, it insists, proves that it (the Association) was not engaged in a good faith participation in the negotiations process at the time the unilateral change occurred. The District relies on this defense as a business or legal necessity to excuse it from the duty to negotiate prior to adoption of changes in matters within the scope of representation.

The District relies on language in NLRB v. Katz, supra, which suggests that there may be a justification for an employer's unilateral action. This language is as follows:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any .reason of substance . . . While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here . . . .

The employer also cites NLRB v. Cone Mills Corporation, 413 F. 2d 445 (CA4, 1969) and American Federation of Television and Radio Artists v. NLRB, 395 F. 2d 622 (1968) which generally support the above cited section of NLRB v. Katz in holding that although unilateral changes may be sufficient, standing alone, to support a finding of refusal to bargain, it does not compel such a finding in disregard of the record as a whole. These cases, however, do not provide any standards as to what exceptions would be appropriate.

The District attempts to develop these standards by emphasizing the underlying rationale and spirit of Katz rather than what it calls the "automatic and mindless application of the per se rule." In this attempt it references San Mateo County Community College District (1979) PERB Decision No. 94.

San Mateo sets forth four reasons for the Katz rule disfavoring employer unilateral action. It does not set up a test or insist that each of these reasons must be present in order for Katz to be operative, but rather attempts to explain why the decision was issued and why the PERB chose to follow it.

In an abbreviated form, the four reasons why an employer's unilateral actions are disfavored are as follows:

(1) it creates a destabilizing and disorienting impact on employer-employee affairs,

(2) it interferes with employee freedom of choice in selection of an exclusive representative,

(3) it is counterproductive to the promotion of negotiating equality consistent with the statutory design and

(4) when carried out in the context of declining revenues, it may unfairly shift community and political pressure to employees and their organizations and at the same time reduce the employer's accountability to the public.

The Respondent attempts to show that its actions, when examined in the context of these four different reasons, do not violate either the spirit or the letter of the Katz decision.

With regard to the first of the reasons, the Respondent argues that its actions did not create, but rather calmed, a destabilizing and disorienting situation. It cites the Association's threatened strike threat as the real destabilizing circumstance.

With regard to the second and third of these reasons, the Respondent insists, in its brief, that its unilateral six-percent salary increase did not interfere with either the freedom of choice in the selection of an exclusive representative or negotiating equality. It sums up the impact of its action by stating that "it actually put the Association in a stronger bargaining position, since the issue of salary was not removed from the table nor were other bargaining issues affected. In substance, respondent merely spotted Charging

Party six percent toward the beginning of the bargaining process without a return concession."

It dismissed the fourth reason with the rather cavalier statement that "respondent merely implemented a six percent increase with no strings attached. This could not possibly result in a particular disadvantage to Charging Party in the eyes of the public."

The Respondent's interpretation of its actions vis-a-vis the first reason employs a somewhat selective evaluation process. The District insists that the unilateral six-percent increase calmed an otherwise chaotic situation. It is true that the salary increase may have reduced support for a strike or other job action in this instance. However, this argument misses the Board's point in San Mateo. The point being that "[a]n employer's single-handed assumption of power over employment relations can" trigger a reciprocal employee action such as a strike or other disruption at the work place. The fact that no such employee action actually occurred in this instance does not, retroactively, make the employer's actions proper. The Board in San Mateo, supra summed up its position with the following sentence, "This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract."

It is in the area of the second and third reasons that the employer's arguments lose most of their credibility. Unilateral action with regard to both the salaries and the

emergency resolution on the part of the employer derogates the authority of the exclusive representative and lessens it in the eyes of the employees. Such acts suggest to the unit members that the exclusive representative is ineffective in protecting them from the employer's actions. It also disrupts the "sometime delicate political framework" and

> tips the negotiating balance so carefully structured by the various provisions of the EERA. In short, the bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters. (See San Mateo, supra.)

With regard to the fourth reason, the Respondent merely asserts that the unilateral salary increase "could not possibly result in a particular disadvantage to Charging Party in the eyes of the public." This conclusionary statement is supported by neither logic nor evidence. It is not the unilateral implementation of the six-percent salary increase that could unfairly shift community pressure to employees and their organization, but the insistence by such employees and their organizations upon a larger increase and additional benefits. The unilateral increase puts the employee organization in the inevitable position of either (1) demanding more benefits and therefore appearing, in the eyes of the community, as greedy or (2) accepting whatever the District decides to hand out with a reluctant tug of the forelock and a half-muttered "wait 'til next year." Neither of these choices enhances a balance of rights and obligations between the parties.

The Respondent attempts to justify its actions by underscoring its motivation in unilaterally implementing the salary increase. Its motivation was to discourage a strike which would disrupt the continuity of education for children in Blythe. However, there was no strike in the District at that time, only a rather ineffective attempt to threaten one. The legitimate answer to such a threat is to be found at the negotiating table and not in a unilateral salary increase or the implementation of changes in working conditions.

The District references the fact that PERB has upheld the right of unions to engage in work stoppages before impasse procedures have been exhausted, when, and only when, such actions are taken in response to an employer's unfair practice(s). See Modesto City Schools (1983) PERB Decision No. 291. It argues that since employers have no reciprocal avenue of self-help, such as a lockout, basic fairness dictates the employer should be allowed to act unilaterally to forestall the threat of an illegal strike if the change in working conditions does not "frustrate the EERA's purpose of achieving mutual agreement through mediation," relying on Moreno Valley Unified School District v. PERB, 191 Cal Rptr at 64. However, in this case there was only a threat to strike.

Although this defense theory does have some basis in both logic and in the fact that reciprocal rights and obligations are a goal espoused by the PERB, it faces three primary stumbling blocks. First, the Board recently, in Compton

Unified School District (1987) PERB Order No. IR-50, expressly overruled Modesto City Schools, supra. In addition, it is unlikely Modesto, supra, would apply, even if it had not been overruled as the facts show that there was only a threat to strike and not an "illegal" strike. It seems unlikely that equity dictates the employer should be given the right to unilaterally implement a salary increase and changes in working conditions in response to only a threat. Secondly, it has been found that the manner in which the salary increase was unilaterally implemented did not enhance but rather was the antipathy of the concept of mutual rights and obligations the Act was designed to foster in that it undermined the Association's ability to effectively represent its members. Lastly, the implementation of a rule such as is being advocated by the Respondent would be so subjective as to allow any employer to unilaterally modify working conditions whenever it believed a threatened job action would be disruptive to the continuity of education in that district. Such a rule would be impossible to administer. For the foregoing reasons this defense must be rejected.

For all of the foregoing reasons it is determined that the Respondent has violated section 3543.5(c> of the Act. The Association has established unlawful unilateral action by the District when it unilaterally implemented both a six-percent salary increase and changes in working conditions. A unilateral failure to negotiate in good faith also is,

derivatively, a violation of sections 3543.5(a) and (b) in that it deprives both employees and their organizations of rights guaranteed by the Act, i.e. the right to bilaterally negotiate their salaries and other working conditions. San Francisco Community College District (1979) PERB Decision No. 105.

There was no evidence proffered by the Charging Party relative to a violation of section 3543.5(e) (failure to participate in good faith in the impasse procedure). Therefore, the portion of the Charge and Complaint that refers to an alleged section 3543.5(e) violation is hereby DISMISSED.

REMEDY

PERB, in section 3541.5(c), is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The ordinary remedy in unilateral change cases is the return to the status quo ante. Rio Hondo Community College District (1983) PERB Decision No. 292. However, under some circumstances when the employees have actually received a pecuniary benefit from the unilateral action, even though it was accompanied by a negotiations detriment, it may be found that such a remedy would not effectuate the purposes of the EERA. Nevada Joint Union High School District (1985) PERB Decision No. 557. Under the circumstances of this case it is found that a status quo remedy is inappropriate and therefore

no such restoration to the status quo ante will be ordered. The fact that the parties later mutually agreed to a ten-percent salary increase, which included the unilaterally imposed six percent is further justification for this determination.

It is, however, appropriate that the District be directed to cease and desist from its unfair practices and to post a notice incorporating the terms of this order. Posting of such a notice, signed by an authorized agent of the District will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District, et al (1980), PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Palo Verde Unified School District violated section 3543.5(c) and, derivatively, (a) and (b) of the Educational Employment Relations Act. Pursuant to Government Code section 3541(c), it is hereby ORDERED that the Palo Verde Unified School District,

its governing board and its representative(s) shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate prior to the modification of subjects within the scope of representation, such as salary and other working conditions.

2. Implementing the emergency resolution enacted by the District's governing board at its September 6, 1985, meeting.

3. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the Act.

4. Denying to the Palo Verde Teachers Association, CTA/NEA, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSE OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Negotiate, upon request of the Association, any modification of subjects within the scope of representation, including the issue of any salary increase and/or modifications of working conditions.

2. Rescind, repeal or otherwise negate the enactment of the emergency resolution enacted by the Board of Education at its September 6, 1985 meeting.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to certificated employees are customarily placed copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in

accordance with his instructions. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page, citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exception and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: June 3, 1987

Allen R. Link
Administrative Law Judge